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proceeding. Rather, ORA simply seeks to reargue matters that were considered and decided in the Hearing Designation Order, DA 93-423, released April 15, 1993 ("HDO"). Thus, ORA's motion is deficient and should be summarily denied.

3. Should the motion be considered on its merits, the Bureau submits that the only possible "controlling" question<sup>1</sup> apparently posed by ORA's motion is whether the Commission can use §§ 73.213 and 73.215 of the Commission's Rules to process construction permit applications when other applications have specified sites meeting the separation requirements of § 73.207 of the Commission's Rules. In this regard, it is undisputed that ORA's application (as well as the application of Westerville Broadcasting Company Limited Partnership) meet the separation requirements of § 73.207, while those of David A. Ringer ("Ringer"), ASF Broadcasting Corporation ("ASF"), Wilburn

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<sup>1</sup> Apparently, ORA believes the question involving the applicability of §§ 73.213 and 73.215 of the Commission's Rules is "controlling" because resolution in ORA's favor will reduce the number of applications entitled to comparative consideration. Nevertheless, a comparative hearing will still be necessary. Thus, ORA has not demonstrated that consideration of its question would materially expedite resolution of this proceeding.

Moreover, the other questions apparently posed by ORA's motion -- namely, whether the HDO properly accepted Shellee F. Davis' ("Davis") amendment to increase her transmitter power; whether the HDO properly determined that Kyong Ja Matchak ("Matchak") and Davis filed amendments on March 9, 1992, not March 10, 1992; and whether Davis violated the ex parte rules -- clearly do not affect the acceptability of the challenged applications. Thus, those matters do not involve controlling questions of law, and their immediate consideration will not materially expedite resolution of this proceeding.

Industries, Inc. ("Wilburn"), Matchak and Davis meet the separation requirements of §§ 73.213 and 73.215, but not those of § 73.207. In finding each of the challenged applications acceptable, the HDO rejected ORA's contention that Commission policy mandates dismissal of short-spaced applications when at least one application in a comparative hearing proceeding proposes a fully-spaced transmitter. In addition, the HDO rejected ORA's arguments that § 73.213 applied only to existing short-spaced stations.

4. In its motion to certify, ORA repeats the contentions considered and rejected in the HDO. ORA also argues that the staff cannot process applications under § 73.215 unless the application demonstrates that no fully-spaced sites are available.

5. The Bureau disagrees with ORA's contention that certification is warranted. First, the HDO correctly decided that Commission policy did not warrant dismissal of the challenged applications. The cases relied on by ORA for the proposition that the Commission will dismiss short-spaced applications when at least one mutually exclusive application has specified a fully-spaced site are inapposite. Each case dealt with applications seeking waivers of § 73.207,<sup>2</sup> not those seeking processing under §§ 73.213 or 73.215.

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<sup>2</sup> E.g., Jemez Mountain Broadcasters, 7 FCC Rcd 4219 (1992).

6. Second, the HDO correctly concluded that EZ Communications, Inc., DA 93-361, released April 5, 1993, and not John M. Salov, 8 FCC Rcd 172 (1993), governed the instant situation. In EZ, the staff concluded that a construction permit application which was mutually exclusive with a renewal of license application could be processed under either § 73.213 or § 73.215. In Salov, the Commission affirmed the dismissal of a construction permit application which had been filed in response to a filing window which the staff had mistakenly opened and which it rescinded before the application was filed. While ORA notes that the Commission stated in Salov that when an allotment becomes vacant § 73.213 is no longer relevant, it is clear that the Commission meant that given the specific factual situation in Salov, § 73.213 did not preclude the dismissal of Salov's application. Thus, while Wilburn and Davis properly seek to use § 73.213 for the processing of their applications, the applicant in Salov improperly cited § 73.213 in an attempt to save a short-spaced allotment and, thus, keep his application viable.

7. Third, both §§ 73.213 and 73.215 expressly contemplate that the Commission will accept and process applications which would otherwise be short-spaced and unacceptable under § 73.207, if those applications meet the requirements of §§ 73.213 or

73.215.<sup>3</sup> Thus, with respect to the challenged applications which seek processing under Section 73.213(c), the Commission can accept and process those applications because they specify the reference coordinates for the Westerville allotment (that is, the site of the former WBBY-FM transmitter) that became short-spaced to WTTF-FM, Tiffin, Ohio, upon revision of § 73.207 pursuant to the Second Report and Order in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989). By comparison, the short-spaced allotment in Salov did not occur because of the revision of § 73.207.

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<sup>3</sup> Section 73.207(a) of the Commission's Rules provides:

Except for assignments made pursuant to § 73.213 or 73.215 .... The Commission will not accept applications for new stations, ... unless transmitter sites meet the minimum distance separation requirements of this section, or such applications conform to the requirements of § 73.213 or 73.215.

Section 73.213(c) states:

Short spacings involving at least one Class A allotment or authorization.... If the reference coordinates of an allotment are short spaced to an authorized facility ... (as a result of the revision of § 73.207 ...), an application for the allotment may be authorized, and subsequently modified after grant, in accordance with paragraph (c)(1) or (c)(2) of this section only with respect to such short spacing.

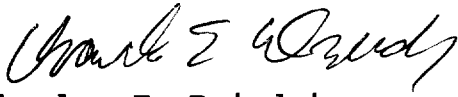
Section 73.215 of the Commission's Rules provides:

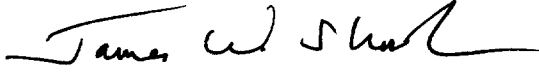
The Commission will accept applications that specify short-spaced antenna locations (locations that do not meet the domestic co-channel and adjacent channel minimum distance separation requirements of § 73.207); Provided That, such applications propose contour protection ... as defined in paragraph (a) of this section, with all short-spaced assignments, applications and allotments, and meet the other applicable requirements of this section.

8. Finally, with respect to the Ringer, ASF and Matchak applications which seek processing under § 73.215, the Commission can accept and process those applications because there is no requirement that the applications first demonstrate that no fully-spaced site exists pursuant to § 73.207. In Amendment of Part 73 - Short-Spacing Criteria, 6 FCC Rcd 5356, 5359-60, ¶¶ 24-27 (1991), the Commission made clear that, because applications could now provide equivalent co-channel and adjacent channel protection by meeting the spacing, power and directional requirements of § 73.215, it would no longer allow waivers of § 73.207. ORA is simply wrong in concluding that the Commission meant to limit the processing of construction permit applications pursuant to § 73.215 only to those situations where no fully-spaced site under § 73.207 was available. Rather, the Commission meant to make § 73.215 processing available for all applications that meet the rule's requirements. Neither the rule itself nor anything in Short-Spacing Criteria suggests otherwise.

9. Accordingly, the Bureau submits that ORA's motion to certify questions to the Commission should be denied.

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**CERTIFICATE OF SERVICE**

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, hereby certifies that she has on this 29th day of April, 1993, sent by regular U.S. mail, U.S. Government frank, copies of the foregoing "Mass Media Bureau's Opposition to Motion to Certify Questions to the Commission" to:

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